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LEGAL PROCESS #2.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA DEPARTMENT OF
WATER RESOURCES,

Plaintiff,

v.

ALLEGHENY ENERGY SUPPLY
COMPANY, L.L.C.; ALLEGHENY
TRADING FINANCE COMPANY, a
wholly-owned subsidiary of AES; DOES
1 through 10, inclusive,

Defendants.

CASE NO.

03AS00488

**COMPLAINT BY PLAINTIFF
CALIFORNIA DEPARTMENT OF WATER
RESOURCES FOR DECLARATORY
RELIEF, DAMAGES AND INJUNCTIVE
RELIEF**

Plaintiff CALIFORNIA DEPARTMENT OF WATER RESOURCES alleges:

1. Plaintiff CALIFORNIA DEPARTMENT OF WATER RESOURCES

("DWR" or Plaintiff) is, and at all relevant times mentioned herein was, an agency of the State of
California with its principal offices in Sacramento, California

1 2. Defendant ALLEGHENY ENERGY SUPPLY COMPANY, LLC
2 ("AESC"), is, and at all times mentioned in this Complaint was, a limited liability corporation
3 duly organized and existing under the laws of the State of Delaware. DWR is informed and
4 believes and thereon alleges that AESC at all times mentioned in this Complaint was not
5 authorized to do intrastate business in the State of California.

6 3. DWR is informed and believes and thereon alleges that Defendant
7 ALLEGHENY TRADING FINANCE COMPANY ("ATF") is a corporation duly organized and
8 existing under the laws of the State of Delaware, and was authorized to do business in the State of
9 California as of January 24, 2003.

10 4. The true names and capacities of defendants stated in this Complaint under
11 the fictitious names DOES 1 through 10, inclusive, are unknown to Plaintiff, who sue such
12 defendants by fictitious names and will amend this Complaint to show their true names and
13 capacities when they are ascertained. Each of the fictitiously named defendants is responsible in
14 some manner for the occurrences or omissions that are alleged herein. Defendants DOES 1
15 through 10, inclusive, have, or claim to have, an interest in the written contract giving rise to an
16 actual controversy existing between Plaintiff and Defendants.

17 5. Unless otherwise alleged, whenever reference is made in this Complaint to
18 any act of defendants, such allegation shall mean that each defendant acted individually and
19 jointly with the other defendants named in the Complaint.

20 6. Unless otherwise alleged, whenever references are made in this Complaint
21 to any act of any corporate or other business defendant, such allegation shall mean that such
22 corporation or other business defendant did the acts alleged in this Complaint through its officers,
23 directors, employees, agents and/or representatives while they were acting within the actual or
24 ostensible scope of their authority.

25 7. At all relevant times alleged in this Complaint, each of the defendants has
26 acted as an agent, representative or employee of each of the other defendants and has acted within
27 the course and scope of said agency or representation.
28

1 8. This Court has jurisdiction pursuant to California Constitution Article VI,
2 section 10, because this case is a cause not given by statute to other trial courts.

3 9. This Court has jurisdiction over the defendants named above because they
4 do sufficient business in California, or otherwise have sufficient minimum contacts in California
5 to render the exercise of jurisdiction over them by the California courts consistent with traditional
6 notions of fair play and substantial justice.

7 10. Venue is proper in this Court because the County of Sacramento is where
8 the contract at issue in this action, identified in paragraph 11, was entered into and was to be
9 performed.

10 11. On or about March 23, 2001, DWR and AESC entered into a written
11 Master Power Purchase and Sale Agreement ("Master Power Agreement"), a true and correct
12 copy of which is attached as Exhibit A and incorporated herein.

13 12. In material part, Section 10.5 of the Master Power Agreement permits
14 AESC to assign the Master Power Agreement or the accounts, revenues or proceeds of the Master
15 Power Agreement without DWR's consent under limited and specific conditions. For example,
16 AESC may assign the Master Agreement or the accounts, revenues or proceeds of the Master
17 Power Agreement without DWR's consent "in connection with any financing or other financial
18 arrangements" so long as AESC provides DWR with such tax and enforceability assurances as
19 DWR may reasonably request. In addition, AESC may assign the Master Power Agreement
20 without DWR's consent "to an affiliate ... which affiliate's creditworthiness is equal to or higher
21 than that of [AESC]" if AESC provides DWR with such tax and enforceability assurances as
22 DWR may reasonably request.

23 13. An actual controversy has arisen and now exists between DWR and AESC
24 concerning their respective rights and duties under the Master Power Agreement, in that DWR
25 contends that AESC assigned the Master Power Agreement and/or the accounts, revenues or
26 proceeds of the Master Power Agreement to ATF without DWR's consent and without meeting
27 the specified and required terms and conditions of an enforceable assignment under Section 10.5
28 of the Master Power Agreement. By letter dated December 24, 2002, AESC informed DWR that

1 AESC had "transferred and assigned its interest in, and has transferred and delegated its
2 obligations under the Master [Power] Agreement to its wholly owned subsidiary (ATF)."
3 AESC's letter to DWR is attached as Exhibit B and incorporated herein by reference. AESC's
4 letter to DWR further stated that the assignment became effective on December 23, 2002.
5 AESC's written notice to DWR of the assignment from AESC to ATF is silent on which, if any,
6 of the required conditions set forth in Section 10.5 of the Master Power Agreement were relied on
7 and were satisfied to permit the assignment without DWR's consent. DWR has not consented to
8 said assignment.

9 14. Under Section 5.1(c) of the Master Power Agreement, it is an Event of
10 Default if AESC fails to perform any material covenant or obligation set forth in the Master
11 Power Agreement "if such failure is not remedied within three (3) Business Days after written
12 notice." On January 16, 2003, DWR submitted a letter to AESC requesting a full explanation,
13 along with documentation satisfactory to DWR, by the end of business on Friday
14 January 24, 2003, establishing that AESC's assignment met the criteria of Section 10.5 of the
15 Master Power Agreement. Said letter from DWR to AESC, a true and correct copy of which is
16 attached as Exhibit C and incorporated herein by reference, further requested in the alternative for
17 "written confirmation" that the assignment was null and void *ab initio*, or has been rescinded.
18 The deadline to respond was extended by DWR from January 24 to noon (EST) on
19 January 28, 2003 by letter which is attached as Exhibit D and incorporated herein by reference.
20 On January 28, 2003, AESC finally responded with a letter to DWR that neither specified which
21 contractual exception permitted its assignment of the Master Power Agreement to ATF without
22 DWR's consent, nor provided any facts that would establish the assignment met the criteria of
23 Section 10.5. AESC's letter dated January 28, 2003, is attached as Exhibit E and incorporated
24 herein by reference. Without identifying a permissible purpose for its assignment of the Master
25 Power Agreement to ATF, AESC's letter stated that ATF was a "single-purpose subsidiary of
26 AESC" whose "only meaningful asset" was the Master Power Agreement assigned to it by
27 AESC.
28

1 15. Section 5.2 of Master Power Agreement in material part provides for
2 automatic termination, without notice, of all Transactions under the Master Power Agreement if
3 either party to the Master Power Agreement becomes "Bankrupt," which is defined in Section
4 1.3. The meaning of "Bankrupt," as defined in Section 1.3, includes but is not limited to a
5 contracting party that "becomes insolvent" or "is generally unable to pay its debts as they fall
6 due."

7 16. A separate and independent controversy has arisen and now exists between
8 DWR and AESC concerning their respective rights and duties under Section 5.2 of the Master
9 Power Agreement, in that DWR is informed and believes and thereon contends that AESC was
10 and/or is insolvent and, alternatively, was and/or is generally unable to pay its debts as they fall
11 due, either of which is a condition by which all Transactions under the Master Power Agreement
12 are automatically terminated without notice. For example, in a joint filing to the Securities and
13 Exchange Commission by AESC and its parent Allegheny Energy, Inc., dated December 20,
14 2002, AESC admits that it is "currently in default in the payment of certain of its obligations."
15 (See, Amendment No. 2 to Form U-1, hereinafter "SEC Form U-1," page 8 of 19, attached as
16 Exhibit F and incorporated herein by reference.) The SEC Form U-1 also states that AESC and
17 its parent "have a liquidity problem – i.e., the ability to pay their debts as they come due." (See,
18 SEC Form U-1, page 15 of 19.)

19 17. AESC disputes DWR's contention that the Master Power Agreement was
20 automatically terminated without admitting or denying that it became insolvent and/or was
21 generally unable to pay its debts as they were due. In its letter to DWR dated January 28, 2002,
22 AESC refused to disclose its "historical financial status" in response to DWR's requests for
23 adequate assurances regarding AESC's financial condition.

24 18. DWR desires a judicial determination of its rights and duties, and a
25 declaration that Master Power Agreement is void and of no force or effect on the grounds that the
26 Master Power Agreement was automatically terminated without notice due to the "Bankrupt"
27 financial condition of AESC, as the quoted term is defined by Section 1.3, or, alternatively, the
28 assignment was a material breach under Section 10.5, sufficient to terminate the Master Power

1 Agreement. A judicial determination as to whether the Master Power Agreement is void and of
2 no force or effect is necessary and appropriate at this time because DWR is informed and believes
3 that the executory portion of the Master Power Agreement will require Californians to pay
4 literally billions of dollars in excess of what the same level of energy and capacity would cost if
5 replacement energy and capacity could be purchased in the market today and for the balance of
6 the term of the Master Power Agreement, which expires on December 31, 2011.

7 WHEREFORE, Plaintiff prays judgment as follows:

8 1. For a declaration that the Master Power Agreement is automatically
9 terminated by operation of the contract;

10 2. For a declaration that the Master Power Agreement is void and of no force
11 or effect;

12 3. For damages in an amount equal to the difference in the value of the
13 payments made under the Master Power Agreement and the fair market value of Per Unit Market
14 Prices that would have been paid in the absence of the Master Power Agreement, plus legal
15 interest thereon, from the date that the Master Power Agreement was automatically terminated
16 under Section 5.2 of the Master Power Agreement, or, alternatively, from the date of an Event of
17 Default under Section 10.5 of the Master Power Agreement, whichever date is earlier in time;

18 4. For issuance of a temporary restraining order, preliminary injunction and
19 permanent injunction restraining and enjoining AESC and/or ATF from assigning the Master
20 Power Agreement or the accounts, revenues or proceeds of the Master Power Agreement to an
21 affiliate of AESC or to any other party without obtaining further order of this Court;

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- 1 5. For costs of suit herein incurred; and
2 6. For such other and further relief as the Court may deem proper.
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4 Dated: January 29, 2003

5 Respectfully submitted,

6 BILL LOCKYER,
7 Attorney General of the State of California
8 RICHARD M. FRANK,
9 Chief Assistant Attorney General
10 THOMAS GREENE,
11 Senior Assistant Attorney General

12 By 

13 NANCY SARACINO

14 Supervising Deputy Attorney General,
15 Attorneys for Plaintiff CALIFORNIA
16 DEPARTMENT OF WATER RESOURCES
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